Supreme Court, U.S.
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No.

IN THE SUPREME COURT OF THE UNITED STATES

THOMAS CAMPBELL BUTLER, MD

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

On Petition for Writ of Certiorari
To The United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal export control crime requiring proof of willfulness be proven simply by showing imputed knowledge when the same law contains an alternative standard for negligent violations of the export control regulations.

2. Whether a defendant can be forced to defend against contract fraud counts involving university grants in the same case as national security counts alleging mishandling of plague samples in the absence of a clear theory of joinder under Federal Rule of Criminal Procedure 8(a).

3. Whether a defendant can be denied testimony of the only witnesses to alleged export control violations based on the unsupported assumption of the court that their testimony would not be able to contribute to a good-faith defense.

4. Whether a court must consider the relevant trial motion before determining that a defendant failed to properly request discovery of critical evidence.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The district court orders denying Petitioner's Motion to Sever (Pet. App. 1a) and Motion to Take Deposition of Tanzanian Witnesses (Pet. App. 2a-4a) are not reported. The district court orders granting the Motion to Quash (Pet. App. 5a-6a) and denying the discovery of e-mail evidence (Pet. App. 7a-9a) are not reported. The district court order imposing sentence (Pet. App. 10a-15a) is not reported. The opinion of the court of appeals (Pet. App. 16a-36a) is reported at 429 F.3d 140. The order of the court of appeals denying the Petition for Rehearing En Banc (Pet. App. 37a-38a) is not reported.

STATEMENT OF JURISDICTION

Final judgment was entered in this case by the United States District Court for the Northern District of Texas, Lubbock Division, on March 10, 2004. The decision of the panel of the Court of Appeals for the Fifth Circuit was rendered on October 25, 2005. The denial of the petition for rehearing *en banc* was rendered on January 11, 2006. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant sections of the International Emergency Economic Powers Act ("IEEPA"), 50 U.S.C. §§ 1701-1707 and Federal Rule of Criminal Procedure 8(a) are reproduced in the appendix to this petition. (Pet. App. 39a-40a).

STATEMENT OF THE CASE

1. Statement of Facts

Dr. Butler is an internationally renowned authority on the study and prevention of infectious diseases, including, in particular, plague.[1] As the world's leading expert on plague, Dr. Butler was in great demand from various governments, including the United States. During 2001, Dr. Butler conducted plague research in Tanzania during an outbreak of the disease with the encouragement of the Food and Drug Administration ("FDA"), the Centers for Disease Control and Prevention ("CDC"), and the United States Army. His goal was to develop a drug to treat plague without harmful side effects, such as blindness and birth defects.

In January 2003, Dr. Butler discovered 30 vials of plague-causing virus – *yersinia pestis* – missing from his laboratory at Texas Tech University Health Sciences Center ("TTUHSC") in Lubbock, Texas. When he could not confirm what happened to the vials, he notified his supervisors who then notified campus police. Soon after, the Federal Bureau of Investigation ("FBI") was informed of the

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[1] The District Court found that Dr. Butler's research and discoveries have "led to the salvage of millions of lives throughout the world," and that his case "exemplif[ies] a great service to society as a whole." (Pet. App. 14a).

incident and government officials began to make statements about the missing vials and Dr. Butler, fueling an international media frenzy. Dr. Butler fully cooperated with the FBI, waived his right to counsel, and agreed to searches of his home and office.

After issuing the original indictment related to the missing vials of *yersinia pestis*, the government asked Dr. Butler to plead guilty to several of the counts in exchange for dropping the remainder of the counts. He was told that if he did not, the government was prepared to add fraud charges stemming from a series of administrative contract disputes with TTUHSC. When he asserted his innocence and refused to plead guilty, the government secured a superceding indictment that added dozens of contract counts unrelated to the plague counts.[2] The government then again demanded a guilty plea to some of the plague counts, and Dr. Butler again refused. Despite motions to sever the two sets of counts, he was then tried on both the contract counts related to his university and the national security and false statements counts related to the handling of plague samples.

2. Proceedings Below

On April 15, 2003, Dr. Butler was indicted on 15 counts related to the alleged improper importation, transportation, and exportation of *yersinia pestis*; two counts of making an alleged false statement to federal officials

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[2] Like academic programs at most universities, TTUHSC received a percentage of some of Dr. Butler's grants and contracts. TTUHSC and Dr. Butler, however, disputed which contracts or grants fell within TTUHSC's shared-fee policies, particularly with respect to consulting contracts. Such disputes are common among academic researchers and their universities. The government's own witnesses admitted that there is a long history of disputes over the requirements of university shared-fee policies governing research contracts, and that TTUHSC's policies were "vague."

(collectively, the "Plague Counts"); and one count alleging a tax violation (the "Tax Count").

A superseding indictment, issued on August 13, 2003, included 54 additional counts alleging misapplication and fraud under certain research and consulting contracts (the "Contract Counts"). The trial court denied motions to sever the Plague, Tax, and Contract Counts. (Pet. App. 1a). After a three-week jury trial, Dr. Butler was convicted on December 1, 2003 of 44 Contract Counts, including mail fraud, wire fraud, and programs fraud, based upon his alleged failure to comply with Texas Tech University policies. He was also convicted of three export control counts: (1) an unauthorized export to Tanzania; (2) illegal transportation of hazardous materials; and (3) making a false statement relating to his declaration on a shipping label. Dr. Butler was acquitted of 22 other counts in the superseding indictment, including the false statements charges.

The United States District Court for the Northern District of Texas entered judgment on March 10, 2004. Dr. Butler filed his notice of appeal on March 24, 2004 and, after completion of briefing, oral argument was held before an appellate panel on June 8, 2005. On October 25, 2005, the panel, in a *per curiam* decision, upheld the conviction.

On November 7, 2005, Dr. Butler filed a petition for a rehearing *en banc* raising four issues: (1) the use of an imputed knowledge standard to prove a willful criminal export control violation; (2) misjoinder of standard contract counts with national security counts involving plague samples; (3) the lower court's failure to address the relevant motion in reviewing the denial of e-mail evidence; and (4) the denial of testimony of the only witnesses to the export control violations based on the lower court's unsupported assumption that their testimony would not contribute to a good-faith defense. This petition was denied on January 11, 2006.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRIOR RULINGS BY DESTROYING THE EXPRESS DISTINCTION BETWEEN CRIMINALLY WILLFUL AND "KNOWING" EXPORT CONTROL VIOLATIONS.

The decision below contradicts this Court's prior holdings on the meaning of "willfulness" in criminal provisions, as explained in its trilogy of cases: *Bryan v. United States*, 524 U.S. 184 (1998); *Ratzlaf v. United States*, 510 U.S. 135 (1994); and *Cheek v. United States*, 498 U.S. 192 (1991). As such, it constitutes an important question of law that contradicts decisions of this Court. S. Ct. Rule 10(c). It further conflates the distinct standards that apply to willful and knowing violations – allowing the same standard of imputed knowledge for either provision. The result would effectively subject all exporters to criminal liability for conduct that is expressly subject to civil treatment under federal law. The potential impact on shippers, researchers, and businesses is obviously significant. If the separate criminal and civil provisions are to be merged at such potential cost, it should be done by a decision of Congress, not the courts. Finally, there is evidence of confusion among the circuit courts as to the applicability of the *Bryan*, *Ratzlaf*, and *Cheek* line of cases. S. Ct. Rule 10(a).

In *Bryan*, the Court established that willful violations generally require a showing that a criminal defendant "acted with an evil-meaning mind." *Bryan*, 524 U.S. at 193. While the Court held that specific knowledge of a federal licensing requirement is not necessary, it is necessary to show "knowledge that his conduct was unlawful." *Id.* The Court further held that specific knowledge is required in some instances where the statutory schemes are complex since, absent a required showing of specific knowledge, non-nefarious conduct could easily be drawn within the scope of